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No. 90-1169

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD CENTER OF EL PASO; STEWART R. MOTT; STEPHEN L. ISAACS; SOSAMMA LINDSAY, on behalf of herself and others similarly situated; and JANE DOE, on behalf of herself and others similarly situated,

Petitioners,

—v.—

AGENCY FOR INTERNATIONAL DEVELOPMENT, and RONALD W. ROSKANS, as Administrator of the Agency for International Development,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. The Clause Unconstitutionally Limits Americans' Unsubsidized Speech and Association With Foreign Nongovernmental Organizations

AID's assertion that "[t]he court of appeals' decision breaks no new constitutional ground" (R.B.[1] at 7) rests entirely on its argument that the Standard Clause is simply the government's decision not to subsidize a particular activity or the exercise of a fundamental right.

The Standard Clause is neither a " 'decision not to subsidize the exercise of a fundamental right' " (R.B. at 9, quoting *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983)), nor a " 'refusal to subsidize' a particular activity." (R.B. at 10.) *See Lyng v. International Union UAW*, 485 U.S. 360 (1988). The Standard Clause does not condition eligibility for government funds on the use to which those funds will be put. Rather, it conditions eligibility for government funds on accepting limits on unsubsidized, entirely separate, speech. These limits are tantamount to extracting an agreement that the foreign non-governmental fund recipient not associate with Planned Parenthood for speech about abortion.

The constitutional issue does not depend upon the status of Planned Parenthood Federation of America (PPFA) as a funding intermediary for AID.[2] Contrary to AID's statement, petitioners are not complaining about "a condition on PPFA's use of federally granted funds." (R.B. at 10.) Petitioners are complaining about a condition that restricts their rights by limiting the privately-financed activities of foreign NGOs that receive, or hope to receive, AID funds. The effect of that restriction is to offer eligibility for massive amounts of government funds only to foreign NGOs that agree not to associate with Planned Parenthood. This is true regardless of the identity of the funding intermediary, and remains true even if the funds flow directly from AID.

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1 "R.B." refers to the Brief for the Respondents in Opposition.

2 PPFA is no longer a funding intermediary for AID. Petition at 3 n.3.

In *Lyng*, this Court set forth the standard for determining when an eligibility condition for government funds infringes the right of association and therefore triggers strict constitutional scrutiny. *Lyng* held that the right of association is infringed when the eligibility condition " 'order[s]' [people or organizations] not to associate together, . . . 'prevent[s]' them from associating together, or burden[s] their ability to do so in any significant manner." 485 U.S. at 366 (citing *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)).[3]

Contrary to AID's assertion that, "[t]he Standard Clause does none of those (R.B. at 9)," in fact, it does all of them. The Clause goes beyond controlling the use of government funds: it "orders" foreign NGOs not to associate with Planned Parenthood with private funds and in separate programs, and likewise "prevents" them from doing so; and it surely "burdens" Planned Parenthood's ability to associate with the foreign NGOs "in any significant manner." (Pet.[4] at 5-6, 13 n.6.)

Stripped of AID's mischaracterizations, the reality of the court of appeals' decision remains. The court of appeals held that government is free to interfere with the exercise of fundamental rights, without "strict scrutiny," so long as it does so by limitations on eligibility for its funds. That holding "breaks new constitutional ground" because it conflicts with this Court's prior "subsidy" decisions. (Pet. at 11-20.) Unlike those prior decisions, the court of appeals' decision makes the unsubsidized exercise of constitutional rights vulnerable to the immense leverage of conditions on unrelated government subsidies. Therefore the holding of the court of appeals should be reviewed by this Court.

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3 The *Lyng* inquiry goes beyond the question of whether the restriction is attached to a subsidy. It depends on the terms of the restriction and the facts. See *Pathfinder Fund v. AID*, 746 F.Supp 192, (D.D.C. 1990), *appeal held in abeyance*, No. 90-5388 (D.C. Cir. 1991). *See also*, *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 548 (1987) ("the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes").

4 "Pet." refers to the Petition for Writ of Certiorari.

II. The Clause Unconstitutionally Censors Information About Abortion That American Women Overseas May Receive

AID's argument here depends upon indulgence of a fiction already rejected by this Court. AID argues that if foreign NGOs abandon the provision of information about abortion, it will be "because they have determined that they would rather receive AID funds, . . . but that is a consequence of the foreign NGO's free choice." (R.B. at 10.)

The same argument, however, would have dictated a different result in *Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986). There, this Court summarily affirmed a holding that a state statute which denied government funds to organizations that provided privately funded abortion counseling created an unconstitutional penalty on women's right to receive information about and have access to abortion.

AID's argument also would have eliminated the constitutional problem that this Court alluded to in *Webster v. Reproductive Health Services*, 109 S. Ct 3040, 3052 n.8 (1989), when it cautioned against a state barring doctors who perform abortions in private facilities from the use of public facilities for any purpose.

In *Babbitt*, an organization's cessation of providing abortion information would have been as much a "consequence of [its] free choice" as the foreign NGO's cessation of providing abortion information is here. Likewise, in *Webster*, the doctor's choice not to perform abortions in private facilities would have been as much a "consequence of [his or her] free choice" as for the foreign NGOs here.

Yet, in *Babbitt*, such government coercion was rejected, and in *Webster*, the prospect of such coercion was cautioned against, because such coercion was or would have been a penalty—denial of a government benefit—imposed upon health care providers as a result of their choices to provide wholly private, constitutionally protected medical assistance.

The court of appeals' decision here upholds precisely the opposite result. Therefore, it must be reviewed.

III. The Clause Unconstitutionally Forces American Organizations To Espouse Particular Beliefs

AID dismisses in a single paragraph PPFA's argument that the Standard Clause violates the first amendment by requiring PPFA to espouse and circulate particular ideas that it finds repellent. AID maintains that PPFA has "no right to insist in court that a government program in which it does not wish to participate be changed into the type of program in which it would like to participate." (R.B. at 11.) This entirely misses the point of PPFA's "forced speech" claim.

PPFA objects not to the government requiring that it abide by restrictions on using government funds, but to insisting that PPFA make prescribed statements about broader issues as a condition of participating in the government program. As explained in the petition (Pet. at 23), the agreements that AID requires its American grantees to secure from foreign subgrantees entail the American grantees, such as PPFA, espousing, and even winning agreement to, highly controversial propositions about abortion in general, not merely about the use to which AID funds can be put.

It is no answer to say, as AID does, that PPFA can avoid having to circulate repellent ideas by dropping out of the AID-funded program,[5] any more than it would have been an answer in *Wooley v. Maynard*, 430 U.S. 705 (1977) that no one is forced to drive a car, or in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) that no one is forced to work for the government. This Court has already made clear in

5 In any case, dropping out of the AID program—as PPFA has in fact done, rather than sign the Clause—does not eliminate the Clause's impact on its constitutional rights. As noted above, petitioners' constitutional objections to the Clause's restriction of their opportunities to associate with foreign groups apply with equal force whatever the mechanism by which AID requires foreigners who receive its funds to shun association with Americans whose views on abortion differ from AID's.

Pacific Gas and Electric v. Public Utilities Comm'n of California, 475 U.S. 1 (1986) and in *Maynard* that it is no defense of such forced speech that the statements are understood by all to be prescribed by the government, not chosen by the speaker.

Government funding pervades almost every aspect of contemporary society. Generally, of course, the government can grant funds as and to whom it wishes and can enforce the limits it chooses to put on its own subsidies. But it does not follow that it can force its grantees to make prescribed statements about unsubsidized matters. Nothing could be more destructive of freedom of expression than for the government to be permitted to demand that individuals or groups shall have financial benefits only if they state things about activities not funded by the government with which they disagree, especially where what the government requires them to say calls for violation of medical ethics as well as of deeply held views.

CONCLUSION

The petition for a writ of certiorari should be granted.

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